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14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 FEDERAL TRADE COMMISSION,
19
20 Plaintiff,

21 v.

22 MICROSOFT CORP.,
and
23 ACTIVISION BLIZZARD, INC.
24 Defendants.

CASE NO. 3:23-cv-02880-JSC

**DEFENDANT ACTIVISION BLIZZARD,
INC.'S STATEMENT IN RESPONSE TO
PLAINTIFF FEDERAL TRADE
COMMISSION'S ADMINISTRATIVE
MOTIONS TO CONSIDER WHETHER
ANOTHER PARTY'S MATERIAL
SHOULD BE SEALED (Civil L.R. 79-5(f))
[ECF NOS. 251, 263]**

Judge: Honorable Jacqueline S. Corley

I. INTRODUCTION

Pursuant to Civil Local Rules 7-11 and 79-5(f)(3), Activision Blizzard, Inc. (“Activision”) respectfully requests that the Court maintain under seal its confidential information identified below, which was provisionally filed under seal pursuant to Plaintiff Federal Trade Commission’s (hereinafter “FTC” or “Plaintiff”) Administrative Motions to Consider Whether Another Party’s Materials Should Be Sealed (the “Administrative Motions”) (ECF Nos. 251, 263). For the reasons described below and in the Declaration of Page Robinson (the “Robinson Decl.”) attached hereto, Activision respectfully requests that the Court consider this submission, which narrows the information that would be maintained under seal within the FTC’s Third Supplement to its Exhibit List (ECF No. 250-1) and the FTC’s Fourth Supplement to its Exhibit List (ECF No. 262-1) (the “Exhibit Lists”).¹

The proposed sealing in the chart below reflects Activision’s good-faith efforts to narrowly seek sealing of only that information which is competitively sensitive and contained in internal documents, the public disclosure of which would cause injury to Activision that cannot be avoided through any less restrictive alternative means.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
FTC’s Third Supplement to its Exhibit List (ECF No. 250-1)	PX2456 Description ²	Activision	This portion contains non-public and highly sensitive information including, but not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities,

¹ This Statement addresses the FTC’s exhibit list descriptions in ECF Nos. 251 and 263. Activision has filed Administrative Motions Seeking In Camera Treatment of the FTC’s underlying exhibits at ECF Nos. 173, 197, 205, 230, and 248 and has also filed a joint omnibus motion addressing admitted exhibits at ECF No. 233, as directed by the Court. *See* June 26, 2023 Trial Tr. 489:22-490:9.

² While this document appeared on the FTC’s exhibit list, it was not admitted during the hearing.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
			and business partnerships, which could be used to injure Activision if made publicly available.
FTC's Third Supplement to its Exhibit List (ECF No. 250-1)	PX2464 Description ³	Activision	This portion contains non-public and highly sensitive information including, but not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, confidential agreements, and business partnerships and negotiations, which could be used to injure Activision if made publicly available.
FTC's Third Supplement to its Exhibit List (ECF No. 250-1)	PX2465 Description	Activision	This portion contains non-public and highly sensitive information including, but not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, confidential agreements, and business partnerships and

³ While this document appeared on the FTC's exhibit list, it was not admitted during the hearing.

Document	Portions to Be Filed Under Seal	Designating Party	Basis for Sealing Request
			negotiations, which could be used to injure Activision if made publicly available.
FTC's Third Supplement to its Exhibit List (ECF No. 250-1)	PX2471 Description ⁴	Activision	This portion contains non-public and highly sensitive information including, but not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, confidential agreements, and business partnerships and negotiations, which could be used to injure Activision if made publicly available.

ARGUMENT

I. Sealing Activision's Confidential Business Information Contained in the Exhibit Lists Is Warranted Under Ninth Circuit Precedent

In the Ninth Circuit, “[p]arties seeking to seal judicial records relating to motions that are ‘more than tangentially related to the underlying cause of action,’ bear the burden of overcoming the presumption with ‘compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.’” *Lenovo (United States) Inc. v. IPCom GmbH & Co., KG*, 2022 WL 2313948, at *1 (N.D. Cal. Jun. 28, 2022); *see also*

⁴ While this document appeared on the FTC's exhibit list, it was not admitted during the hearing.

1 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“[T]he court must
 2 ‘conscientiously [] balance the competing interests’ of the public and the party who seeks to keep
 3 certain judicial records secret.”). Courts in this Circuit regularly find that sealing is warranted
 4 where the records or information that are sought to be sealed could be used “as sources of business
 5 information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*,
 6 435 U.S. 589, 598 (1978); *see also In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2008)
 7 (same); *Velasco v. Chrysler Grp. LLC*, No. CV 13-08080 DDP (VBK), 2017 WL 445241, at *2
 8 (C.D. Cal. Jan. 30, 2017) (stating that “district courts in this Circuit have sealed records containing
 9 ‘information about proprietary business operations, a company’s business mode or agreements with
 10 clients,’ [and] ‘internal policies and strategies’”) (internal citations omitted).

11 “The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh
 12 the public’s interest in disclosure and justify sealing court records exist when such court files might
 13 have become a vehicle for improper purposes, such as the use of records to . . . release trade
 14 secrets.’” *Velasco*, 2017 WL 445241, at *2 (quoting *Elec. Arts*, 298 F. App’x at 569); *see also*
 15 *Elec. Arts*, 298 F. App’x at 569 (“A ‘trade secret may consist of any formula, pattern, device or
 16 compilation of information which is used in one’s business, and which gives him an opportunity to
 17 obtain an advantage over competitors who do not know or use it.’”) (citation omitted). A court has
 18 “broad latitude” to grant protective orders to prevent disclosure of “many types of information,
 19 including, but not limited to, trade secrets or other confidential research, development, or
 20 commercial information.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,
 21 1211 (9th Cir. 2002).

22 In determining whether a document should be filed under seal, courts consider, among
 23 other things, the measures taken to guard the information’s secrecy and the value of the
 24 information to the business or its competitors. *E.g., Phillips ex rel. Estates of Byrd v. Gen. Motors*
 25 *Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). Here, Activision seeks to seal narrowly tailored
 26 excerpts of the Exhibit Lists which reference and reflect, among other things, confidential,
 27 proprietary information relating to Activision’s internal decision-making processes, strategic
 28 evaluation of forward-looking opportunities, confidential agreements, business partnerships and

negotiations, and internal business strategy. The disclosure of this information could be used to injure Activision if made publicly available.

II. Sealing the Exhibit Lists Is Necessary to Protect Activision’s Confidential and Proprietary Business Information

Activision seeks to maintain under seal portions of the Exhibit Lists, as they contain Activision’s non-public and highly sensitive information from documents obtained during the course of the FTC’s investigation and during litigation discovery. Robinson Decl. ¶¶ 4–6. Examples of such confidential information include, but are not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, confidential agreements, business partnerships and negotiations, and internal business strategy. *Id.* ¶ 4. Activision takes robust measures to maintain the confidentiality of all the above-described information and does not disclose it publicly. *Id.* ¶ 6. Disclosure of this information would provide Activision’s competitors with private information about Activision’s performance and internal business strategy, as well as information about Activision’s confidential agreements and negotiations with its business partners, which could harm Activision’s competitive standing. *Id.* ¶ 5; *see Cont’l Auto. Sys. v. Avanci, LLC*, No. 19-cv-02520-LHK, 2019 WL 6612012, at *4 (N.D. Cal. Dec. 5, 2019). Thus, the unsealing of this highly confidential and sensitive information would cause injury to Activision that cannot be avoided through less restrictive alternatives. *See* Robinson Decl. ¶ 5.

Finally, Activision provided the FTC with the confidential business information cited in the Exhibit Lists pursuant to the statutory and regulatory guarantees of confidentiality contained in the Hart-Scott-Rodino Act or the FTC Act. *Id.* ¶ 6; *see also* 15 U.S.C. §§ 18a(h), 46(f), 57b-2(b), 57b-2(c); 6 C.F.R. § 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to maintain the confidentiality of a party’s confidential business information that has been provided to the FTC via a regulatory request. *See, e.g., FTC v. Lockheed Martin Corp.*, 2022 WL 1446650, at *2 (D.D.C. Jan. 25, 2022) (“According to the FTC, sealing the complaint is appropriate . . . because the filing includes confidential information submitted . . . pursuant to ‘statutory and regulatory guarantees of

1 confidentiality.’ . . . The requested sealing covers only confidential information and is, according to
 2 the FTC, required by regulation.”).

3 **III. Conclusion**

4 As stated above, compelling reasons justify sealing Activision’s confidential business
 5 information contained within the Exhibit Lists, and Activision respectfully requests that this Court
 6 grant the FTC’s Motions to Seal (ECF Nos. 251, 263), consistent with the specific recitations stated
 7 herein. In accordance with Civil Local Rule 7-11, Activision has also filed a Proposed Order
 8 herewith.

9
 10 DATED: July 5, 2023

By: /s/ Caroline Van Ness

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